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Attorneys for Defendant Google LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CHASOM BROWN, WILLIAM BYATT,
JEREMY DAVIS, CHRISTOPHER
CASTILLO, and MONIQUE TRUJILLO,
individually and on behalf of all similarly
situated,

Plaintiffs,

v.

GOOGLE LLC,
Defendant.

Case No. 5:20-cv-03664-LHK-SVK

**DEFENDANT GOOGLE LLC'S
ADMINISTRATIVE MOTION TO SEAL
THE COURTROOM FOR HEARING ON
JOINT SUBMISSION (DKT. 230)**

Referral: Hon. Susan van Keulen, USMJ
Hearing Date: August 12, 2021
Hearing Time: 9:30 A.M.

1 I. INTRODUCTION

2 Plaintiffs have confirmed that they will reference or discuss Google protected materials at
 3 the August 12, 2021 hearing related to the parties' Joint Submission In Response to Dkt. 191, 191-
 4 1 Re: Status of Discovery Disputes ("Joint Submission") (Dkt. 230). The parties submitted their
 5 Joint Submission (Dkt. 230) on August 2, 2021, which Google filed under seal and is still pending
 6 before the Court (Dkt. 228, 229). On July 30, 2021, the Court ordered the parties to "identify two
 7 disputes as 'priority,' which the Court will take up first." Dkt. 227. The parties complied: Plaintiffs
 8 identified Disputes P1 (custodial documents) and P14 (source code); and Google identified Disputes
 9 P10 (timeline for producing Google custodial documents) and P17 (timing and number of Google
 10 depositions) as their priority issues to be discussed at the August 12, 2021 hearing. Dkt. 230.

11 In accordance with Section 5.2(b) of the Protective Order (Dkt. 81), Plaintiffs informed
 12 Google that they intend to discuss at the August 12, 2021 hearing four of Google's documents that
 13 were designated Confidential, i.e., GOOG-BRWN-00027227, GOOG-BRWN-00164056, GOOG-
 14 BROWN-00067720, and GOOG-BRWN-00183909. Plaintiffs have further advised they intend to
 15 discuss the information Google sought to seal at pages 7, 8, 11, 12, 24, 31, 59, and 60 of the Joint
 16 Submission (Dkt. 230). These discussions will contain Google's confidential and proprietary
 17 information regarding highly sensitive features of Google's internal systems and operations that
 18 Google does not share publicly and may be discussed at the August 12, 2021 hearing, including (1)
 19 various data logs maintained by Google, (2) Google's internal communications and practices with
 20 regard to Incognito, X-Client-Data Header, and their corresponding proprietary functions, and (3)
 21 the various types of cookies, internal identifiers and projects Google uses internally.

22 Plaintiffs also informed Google that they may rely on additional documents cited in the
 23 parties' July 21, 2021 Joint Case Management Statement ("Joint Statement") (Dkt. 224) at the
 24 August 12, 2021 hearing but refused to identify the specific documents. Google previously filed the
 25 Joint Statement under seal (Dkt. 223), which the Court granted (Dkt. 226).

26 The Court previously sealed the April 29, 2021 hearing (Dkt. 143) and portions of the
 27 transcript (Dkt. 174) as well as the June 2, 2021 hearing (Dkt. 183) and portions of the transcript
 28 (Dkt. 197) in this case related to the same or substantively similar information pursuant to Google's

1 request. At the time of this filing, Google does not anticipate that protected information will be
 2 discussed in the August 12, 2021 hearing in *Calhoun v. Google LLC*, No. 5:20-cv-5164 (N.D. Cal.)
 3 and therefore will not move to seal the courtroom for that hearing.

4 In light of the highly confidential material to be discussed at the August 12, 2021 hearing,
 5 Google asked Plaintiffs to stipulate to sealing the hearing pursuant to Civil Local Rules 7-11 and
 6 79-5 and Federal Rule of Civil Procedure 26(c). Tse Decl., ¶ 3. Plaintiffs stated they do not oppose
 7 Google’s request. *Id.* Therefore, Google now moves the Court to seal the courtroom for the August
 8 12, 2021 hearing on the Joint Submission (Dkt. 230).

9 II. LEGAL STANDARD

10 The common law right of public access to judicial proceedings is not a constitutional right
 11 and it is “not absolute.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978); *Crowe v. Cty.*
 12 *of San Diego*, 210 F. Supp. 2d 1189, 1194 (S.D. Cal. 2002) (“[T]here is no right of access which
 13 attaches to all judicial proceedings.” (internal citations omitted)). The right is weakest where, as
 14 here, the proceedings concern a non-dispositive discovery motion; rather than satisfy the more
 15 stringent “compelling reasons” standard, a party seeking to seal materials in these circumstances
 16 must make only a “particularized showing” of “good cause.” *Kamakana v. City & County of*
 17 *Honolulu*, 447 F.3d 1172, 1178–80 (9th Cir. 2006). Such sealing is appropriate when the information
 18 at issue constitutes “competitively sensitive information,” such as “confidential research,
 19 development, or commercial information.” *France Telecom S.A. v. Marvell Semiconductor Inc.*,
 20 2014 WL 4965995, at *4 (N.D. Cal. Oct. 3, 2014); *see also Phillips v. Gen. Motors Corp.*, 307 F.3d
 21 1206, 1211 (9th Cir. 2002) (acknowledging courts’ “broad latitude” to “prevent disclosure of
 22 materials for many types of information, including, but not limited to, trade secrets or other
 23 confidential research, development, or commercial information”); *Standard & Poor’s Corp. Inc. v.*
 24 *Commodity Exch., Inc.*, 541 F. Supp. 1273, 1275 (S.D.N.Y. 1982) (“[T]he overriding interest to be
 25 found in business confidences . . . require[s] . . . temporary reasonably restricted access to the
 26 Courtroom of members of the public.”).

1 **III. THE HEARING SHOULD BE SEALED BECAUSE PARTIES' ARGUMENTS WILL**
 2 **NECESSARILY INVOLVE DISCLOSURE OF GOOGLE'S HIGHLY SENSITIVE**
 3 **MATERIAL**

4 All facts militate in favor of sealing the August 12, 2021 hearing. The “good cause” standard
 5 that governs the sealing determination in non-dispositive motions is easily met. The parties’ Joint
 6 Submission contains detailed discussions on Google’s confidential information, including the highly
 7 sensitive features of Google’s systems and operations. *See* Dkts. 224, 228, 229, 230. As explained
 8 in Google’s pending Administrative Motion to Seal Joint Submission and Plaintiffs’ Proposed
 9 Orders (Dkts. 228, 229), the information sought to be sealed for this hearing reveals Google’s
 10 internal strategies, system designs, and business practices for operating and maintaining many of its
 11 important services while complying with its legal and privacy obligations. Dkt. 228 at 3; Dkt. 229
 12 at 3. Such information is protectable and must be kept confidential in order to prevent harm to
 13 Google’s competitive standing. Dkt. 228 at 3; Dkt. 229 at 3. Moreover, public disclosure of Google’s
 14 confidential information may put Google at an increased risk of cybersecurity threats. *Id.* at 3.

15 First, out of the four priority issues, only Plaintiffs’ two priority issues, i.e., Disputes P1
 16 (custodial documents) and P14 (source code), contain information that Google filed under seal and
 17 is still pending before the Court (Dkt. 228, 229). Plaintiffs filed a Proposed Order in connection with
 18 Dispute P1 and P2 (custodial documents and searches), which Google filed under seal on the basis
 19 that the proposed redactions are narrowly tailored to protect highly confidential and proprietary
 20 information regarding highly sensitive features of Google’s internal systems and operations,
 21 including details related to cookies, internal identifiers and projects, and various data logs
 22 maintained by Google, that Google maintains as confidential in the ordinary course of its business
 23 and is not generally known to the public or Google’s competitors. Dkts. 229, 229-4. Similarly,
 24 Dispute P14 (source code) includes information that Google filed under seal on the basis that the
 25 request is narrowly tailored to protect highly confidential and proprietary information regarding
 26 highly sensitive features of Google’s internal identifiers and projects. Dkts. 228-4 at 24.

27 Second, Plaintiffs have further provided notice that they intend to discuss confidential
 28 information related to P2 (search terms), P4 (server logs), P12 (RFP Nos. 163 and 166), and P18
 (hyperlinked documents) (*see* Dkt. 228-4 at 7, 8, 11, 12, 31, 59, 60), including GOOG-BRWN-

1 00027227 (discussed in P4), and GOOG-BRWN-00164056, GOOG-BROWN-00067720, and
2 GOOG-BRWN-00183909 (discussed in P12), which Google has designated as Confidential and
3 filed under seal. *See* Dkts. 228, 229. To address the issues Plaintiffs raised with respect to these
4 four disputes and the associated documents, Google will need to rely on confidential information
5 regarding highly sensitive features of Google's operations. Specifically, this information provides
6 details related to the various types of data logs maintained by Google, information contained in
7 those logs, the logs' retention policies, various types of Google's internal identifiers, cookies, and
8 projects, as well as Google's internal communications and practices with regard to Incognito, X-
9 Client-Data Header, and their proprietary functions. Such information reveals Google's internal
10 strategies, proprietary system designs, business practices, and system capacities for operating and
11 maintaining many of its important services while complying with its legal and privacy obligations.
12 This Court has previously granted Google's motion to seal the courtroom on this issue in this case,
13 Dkts. 143, 183, and in *Calhoun*, Dkt. 124. Google must be able to freely refer to this information to
14 fully explain to the Court how its internal logs, identifiers, cookies, and projects work as well as
15 Incognito and X-Client-Data Header, in order to contradict Plaintiffs' unsupported positions—
16 without fear of public disclosure of sensitive Google business information. It would be unfair and
17 prejudicial to force Google's counsel to choose between providing facts to the Court by relying on
18 this confidential information and retaining the confidentiality of these highly sensitive facts.

19 Third, Plaintiffs also informed Google that they may rely on additional documents cited in
20 the parties' July 21, 2021 Joint Case Management Statement (Dkt. 224) at the August 12, 2021
21 hearing. Google filed the Joint Statement under seal (Dkt. 223) and the Court ordered portions of
22 the Joint Statement sealed (Dkt. 226).¹ If the hearing is not sealed, Google would have to pick

23
24 ¹ The Court previously granted Google's Administrative Motion to Seal as to redacted portions of
25 the July 21, 2021 Joint Statement at 4: 26-27; 5:3-10, 20-23; 7:17-28; 8:1-2; 9:26-28; 10:1-5, 10-
26 11, 13-18; 11:5, 7-10, 13-15; 12:19-22, 13:13; 16:2-3, 5-11, 13-14 on the basis that the request was
27 narrowly tailored to protect highly confidential and proprietary information regarding highly
28 sensitive features of Google's internal systems and operations, including details related to cookies,
internal identifiers and various data logs maintained by Google, as well as Google's internal
communications and practices with regard to Incognito, X-Client-Data Header and their proprietary
functions, that Google maintains as confidential in the ordinary course of its business and is not
generally known to the public or Google's competitors. Dkt. 226.

1 between two evils: revealing its highly confidential information that may harm Google and put it at
 2 a competitive disadvantage, or vigorously arguing—without supporting facts—that Plaintiffs’
 3 blunderbuss discovery demands are burdensome and disproportional.

4 Given the importance and highly sensitive nature of the aforementioned information related
 5 to the parties’ discovery disputes, Google believes that sealing the courtroom is the correct and most
 6 effective approach. Indeed, this Court has recently sealed the April 29, 2021 and June 2, 2021
 7 hearing and transcript where the same or substantively similar information was discussed. The
 8 virtual proceedings in this case permit the attendance of hundreds of interested members of the
 9 public, including legal experts and journalists, and allowing confidential material to be discussed in
 10 open court in these circumstances is tantamount to having it filed publicly on the docket. Google
 11 proposes that the Court seal the August 12, 2021 hearing and that Google will file a motion to seal
 12 the August 12, 2021 transcript 7 business days after the hearing to redact any confidential
 13 information.

14 Google defers to the Court as to the best method for sealing the August 12, 2021 hearing in
 15 light of the virtual proceedings but proposes that the Court may consider directing the parties to dial
 16 into a private Zoom meeting, instead of a Zoom webinar.

17 **IV. CONCLUSION**

18 For the foregoing reasons, Google respectfully requests that the Court seal the August 12,
 19 2021 hearing on the parties’ Joint Submission (Dkt. 230).

21 DATED: August 11, 2021

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